90

(1)

Supreme Court, U.S.
FILED

071354 APR 22 2008

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

MICHAEL J. BUDD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SEBASTIAN RUCCI
Counsel of Record

40 The Ledges, Unit 3C
Poland, OH 44514
(330) 707-1182
(330) 707-1882
SebRucci@Gmail.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Michael Budd was indicted for violating 18 U.S.C. § 242 by depriving an inmate of his Fourteenth Amendment right against excessive force amounting to punishment. The government switched theories at trial, and tried the case, jury instructions and all, based on an Eighth Amendment deprivation. This presents the following question:

> Did the court below err in holding that the jury instructions which altered the text of the indictment is not an amendment in violation of the defendants Fifth Amendment's jury indictment guarantee?

PARTIES TO THE PROCEEDING

The petitioner in this case is Michael Budd.

The respondent is the United States of America.

TABLE OF CONTENTS

Question Presented i

Parties To The Proceeding ii

Table Of Contents iii

Table Of Authorities iv

Opinions Below 1

Jurisdiction 1

Statement Of The Case 1

Reason For Granting The Writ 3

Certiorari Should Be Granted To Secure And Maintain Uniformity Of This Court's Decisions 3

Conclusion 12

TABLE OF AUTHORITIES

Cases

Berger v. United States, 295 U.S. 78 (1935) 6, 7

Ex parte Bain, 121 U.S. 1 (1887),
overruled on other grounds by
United States v. Cotton,
535 U.S. 625 (2002) 4, 5, 7, 10

Stirone v. United States,
361 U.S. 212 (1960) 5, 6, 7, 11

U.S. v. Budd, 496 F.3d 517 (6th Cir. 2007) ... *passim*

United States v. Chilingirian,
280 F.3d 704 (6th Cir. 2002) 11

United States v. Cotton, 535 U.S. 625 (2002) 4

United States v. Hathaway,
798 F.2d 902 (6th Cir. 1986) 11

United States v. Russell, 369 U.S. 749 (1962) 10

Constitution, Statutes and Rules

18 U.S.C. § 242 ..... *passim*

28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Michael Budd respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeal for the Sixth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' decision denying rehearing (App. 49a) is unreported. Its decision on the merits (App. 1a-13a) is reported at 496 F.3d 517.

JURISDICTION

The petition for rehearing *en banc* was denied on January 23, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Mike Budd, a major in the county sheriff's department, was charged with a four count indictment. Count 3 of the indictment charged Mike Budd with violating 18 U.S.C. § 242 by depriving inmate Brandon Moore of his Fourteenth Amendment rights against excessive force amounting to punishment.

Mike Budd plead not guilty to the charges. Mike Budd moved to dismiss Count 3 because Inmate Moore had already been arrested, convicted, and sentenced, and the proper protection for a convicted inmate is the Eighth Amendment protection against cruel and unusual punishment.

The trial court denied the motion to dismiss and instead instructed the jury to convict if it found that Mike Budd violated § 242 by depriving inmate Moore of his Eighth Amendment rights. In effect, the government secured an indictment premised on a Fourteenth Amendment deprivation, and it then switched theories and tried the case -- jury instructions and all -- based on an Eighth Amendment deprivation.

During the first trial the jury reached a partial verdict on Count 1. At retrial Mike Budd was found guilty of Counts 2, 3 and 4. However, the jury instructions did not mirror the indictment. Michael Budd was convict of depriving inmate Moore's Eighth Amendment rights, for using "malicious and sadistic" or "unnecessary and wanton" excessive force on inmate Moore. Mike Budd was sentenced to ninety seven months incarceration.

Mike Budd appealed the conviction and argued that the District Court engaged in a judicial amended of the indictment when it changed the protections in Count 3 from the Fourteenth to the Eighth in violation of Mike Budd's Fifth Amendment grand jury indictment guarantee. The Court of Appeals upheld the conviction but noted that "our precedent in this area may not be easy to follow." *U.S. v. Budd,* 496 F.3d at 520, fn 2. Judge Cook's dissented and noted that this "topic has troubled this court for years" and "the majority favors this court's inscrutable doctrine over clearer commands from the Supreme Court." *U.S. v. Budd,* 496 F.3d at 533 (Cook J. dissenting).

Judge Cook explained that "when the jury instructions do not mirror the indictment--as was true

in Budd's case--the defendant's claim is properly categorized under the "constructive amendment" rubric. Although Budd's indictment charged him with violating 18 U.S.C. § 242 by depriving inmate Moore of his Fourteenth Amendment rights, the court instructed the jury to convict if it found that Budd violated 18 U.S.C. § 242 by depriving Moore of his Eighth Amendment rights. In other words, after the government secured an indictment premised on a Fourteenth Amendment deprivation, it switched theories and tried the case--jury instructions and all--based on an Eighth Amendment deprivation. . . .I would **reverse** Budd's conviction **on this count** and remand for resentencing. *U.S. v. Budd,* 496 F.3d at 535 (Cook J. dissenting) (footnote omitted).

On January 23, 2008, the court denied the petition for rehearing *en banc*. Judge Cook would grant rehearing for the reasons stated in her dissent. App. 49a.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO SECURE AND MAINTAIN UNIFORMITY OF THIS COURT'S DECISIONS.

The majority decision in *U.S. v. Budd* conflicts with the decision of the United States Supreme Court on constructive amendments and consideration by this court is necessary to secure and maintain uniformity of this court's decisions.

The Supreme Court precedents have identified three theories to complain of inconsistencies between

the indictment and either the jury instructions, the proof at trial, or both: (1) actual amendment, (2) constructive amendment, or (3) variance.

The first theory, actual amendment, traces to *Ex parte Bain*, 121 U.S. 1 (1887), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 629-31 (2002). The grand jury indicted Bain and other bank officials for making false statements "with intent to deceive the comptroller of the currency and the agent appointed to examine the [bank's] affairs." *Id.* at 4. Thirteen months later, the prosecution moved the trial court to strike the words "the comptroller of the currency and" from the indictment. *Id.* at 5. The trial court granted the motion and struck the language, and Bain was convicted. The Supreme Court granted Bain's habeas corpus petition, concluding that this rewriting of the indictment ran afoul of the Fifth Amendment's command that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." *Id.* at 6, 13-14. Specifically, the conviction could not stand because the grand jury had never considered the government's new theory that Bain had made false statements intending to deceive the agent, but not the comptroller. *See id.* at 13 ("[A]fter the indictment was changed it was no longer the indictment of the grand jury who presented it."). The Court reasoned that the grand-jury component of the Fifth Amendment checks overzealous prosecution and ensures that a citizen is not exposed to the risks and expense of a trial unless a grand jury composed of his peers determines that he should.

The second theory, constructive amendment, is a legal fiction developed after *Bain*--a prosecutor could no longer *physically* rewrite the indictment, but he could still *effectively* rewrite the indictment by leaving its language untouched, but proposing jury instructions that embody a new theory of crime. This presents the same evil as an actual amendment: no grand jury passed on the essential description of the crime that ultimately formed the basis for conviction, a circumstance that contravenes the Fifth Amendment. Thus, courts developed the legal fiction of a "constructive amendment" to prevent this mischief.

In *Stirone v. United States*, 361 U.S. 212 (1960), the seminal Supreme Court case on constructive amendments, the grand jury indicted the defendant under the Hobbs Act for interfering with interstate commerce in sand, but the trial court permitted the government to argue that the defendant interfered with interstate commerce in steel, too, and the defendant was convicted. *Id.* at 213-14. The Supreme Court reversed the defendant's conviction, noting that "[a]lthough the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same." *Id.* at 217. *Stirone* reveals two distinguishing features of a constructive amendment. First, a constructive amendment involves not just a "variation between pleading and proof," *id.*, but also an irregularity in the jury instructions, *see id.* at 219 ("[W]e cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with. Yet because of the court's admission of evidence *and under its charge* this might have been the basis upon which the trial jury convicted petitioner."

(emphasis added)). Second, a constructive amendment is not amenable to harmless-error analysis. *Id.* at 217 ("Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.").

The third theory, alluded to in *Stirone*, is the variance. *Stirone* makes clear that a variance results when there is a "variation between pleading and proof," *see id.*, but the jury instructions properly mirror the language of the indictment, *see id.* at 215, 217-18.

In *Berger v. United States*, 295 U.S. 78 (1935), the irregularity came when the prosecution introduced proof of a second conspiracy in addition to the one charged. *Id.* at 79-81. The Court questioned whether the variance "affect[ed] the substantial rights" of the defendant, *id.* at 82, and concluded that it did not, *id.* at 83-84. *Berger* confirms that a variance has nothing to do with the defendant's Fifth Amendment grand jury right: the Court never mentioned the concept. Instead, a variance issue turns on whether the defendant (1) has sufficient notice of the allegations to mount a defense, and (2) will be protected against double jeopardy. *Id.* at 82. These lesser concerns require reversal only if the defendant shows prejudice to a substantial right. *Id.*

These three cases demonstrate that distinguishing a constructive amendment from a variance requires review of the jury instructions. When the jury instructions mirror the indictment and the defendant claims only that the proof at trial diverged from the indictment, he can complain only of a variance and must show prejudice. But when the jury instructions

do not mirror the indictment -- as was true in Mike Budd's case -- the defendant's claim is properly categorized under the "constructive amendment" rubric.

Although Budd's indictment charged him with violating 18 U.S.C. § 242 by depriving inmate Moore of his Fourteenth Amendment rights, the court instructed the jury to convict if it found that Budd violated 18 U.S.C. § 242 by depriving Moore of his Eighth Amendment rights. In other words, after the government secured an indictment premised on a Fourteenth Amendment deprivation, it switched theories and tried the case--jury instructions and all--based on an Eighth Amendment deprivation.

Judge Cook's dissenting opinion properly notes "the majority favors this court's inscrutable doctrine over clearer commands from the Supreme Court." *U.S. v. Budd,* 496 F.3d at 533 (Cook J. dissenting). Judge Cook's dissenting opinion explains the error in the majority decision with the following passages:

> The majority avoids the three Supreme Court cases [*Bain*, *Stirone* and *Berger*] and instead attempts to draw from this court's precedent a principle that "a variance in some cases is not different in kind from a constructive amendment, but merely in degree; if it is serious enough, it *becomes* a constructive amendment." For two reasons, I cannot agree. First, the concepts of "variance" and "constructive amendment" differ in kind, not degree: either the jury instructions mirror the indictment, or they do not. The principle identified by the

majority likely results from loose language in past cases; that is, labeling what is actually just a prejudicial variance a 'constructive amendment.' If the court reverses based only on irregularities of proof, it is because the variance prejudiced the defendant's substantial rights, not because it was a constructive amendment. Second, the practical implications of a framework where a variance can 'rise to the level' of a constructive amendment reveal its flaw. Presumably, under the majority's framework, the defendant must show that a supposed variance "rose to the level" of a constructive amendment by showing that he was actually prejudiced. If the defendant must show actual prejudice to get per se treatment, this would eliminate the need for even the *concept* of prejudice per se--every case would turn on whether the defendant had shown "enough" actual prejudice.

. . . [The majority] finds a mere variance, concluding that violating Moore's Fourteenth Amendment rights is merely an 'alternative method' by which Budd could have violated 18 U.S.C. § 242. I cannot agree. Moore was a convicted inmate whose rights against excessive force sound exclusively in the Eighth Amendment, so the only "method" by which Budd could have violated 18 U.S.C. § 242 would have been by depriving Moore of his Eighth Amendment rights against cruel and unusual punishment. Depriving Moore of Fourteenth Amendment rights against excessive force amounting to punishment--rights that, based on

> his inmate status, Moore does not even have--simply is not a "method" by which Budd could have violated 18 U.S.C. § 242.
>
> . . . [T]he majority appears to dismiss any irregularity in this case by reasoning that the 'evidence' or 'proof' presented to the grand jury would have been the same whether the indictment had charged an Eighth or Fourteenth Amendment deprivation. I respectfully suggest that by focusing on Budd's actions and ignoring his mental state, the majority misses the point.

U.S. v. Budd, 496 F.3d at 536-37 (Cook J. dissenting) (footnotes omitted) (emphasis added).

This court's cases regarding constructive amendments demonstrate that distinguishing a constructive amendment from a variance requires review of the jury instructions. When the jury instructions mirror the indictment and the defendant claims only that the proof at trial diverged from the indictment, he can complain only of a variance and must show prejudice. But when the jury instructions do not mirror the indictment the defendant's claim is properly categorized under the "constructive amendment" rubric.

Although Mike Budd's indictment charged him with violating 18 U.S.C. § 242 by depriving inmate Moore of his Fourteenth Amendment rights, the court instructed the jury to convict if it found that Budd violated 18 U.S.C. § 242 by depriving inmate Moore of his Eighth Amendment rights. In other words, after the

government secured an indictment premised on a Fourteenth Amendment deprivation, it switched theories and tried the case--jury instructions and all--based on an Eighth Amendment deprivation. The grand jury did not pass on the charge submitted to the jury -- Mike Budd violated Brandon Moore's Eighth Amendment rights -- and since the jury instructions did not mirror the indictment this was an amendment in contravention of Supreme Court precedent.

The "grand jury never decided that Mike Budd should stand trial for using 'malicious and sadistic' or 'unnecessary and wanton' excessive force on inmate Moore. *See Bain*, 121 U.S. at 10-13 (discussing the protection afforded by the grand jury).

Judge Cook noted in her dissenting opinion that "although widespread experience suggests that the grand jury was unlikely to tarry over *mens rea* subtleties, the Supreme Court has explicitly forbidden us from speculating on subjects such as whether the grand jury would have indicted Budd for an Eighth Amendment deprivation just as it actually indicted him for a Fourteenth Amendment deprivation." *U.S. v. Budd*, 496 F.3d at 537 (Cook J. dissenting).

As this Court said in *United States v. Russell* 369 U.S. 749, 770 (1962) (citing *Bain*, 121 U.S. 1, and *Stirone*, 361 U.S. 212), "To allow . . . the court[] to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. . . . This underlying principle is reflected by the settled rule in the federal

courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form."

The indictment charged a violation of the Fourteenth, the jury instructions changed a violation under the Eighth Amendment. This forced the "defendant to be tried on charges that are not made in the indictment against him." *Stirone*, 361 U.S. at 217.

Even the majority's decision in *U.S. v. Budd* notes that "our precedent in this area may not be easy to follow." *U.S. v. Budd,* 496 F.3d at 520, fn 2. This "topic has troubled this court for years." *U.S. v. Budd,* 496 F.3d at 533 (Cook J. dissenting). The "majority favors this court's inscrutable doctrine over clearer commands from the Supreme Court." *Id.* See also, *United States v. Chilingirian*, 280 F.3d 704, 712 (6th Cir. 2002) ("[T]he distinction between a variance and a constructive amendment is sketchy."); *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986) ("[T]he distinction between a variance and a constructive amendment is at best 'shadowy . . . .'").

The jury instructions literally altered the indictment and this constituted a violation of Michael Budd's Fifth Amendment grand jury indictment guarantee. This court should take this opportunity to clarify this court's precedent and the Supreme Court decisions regarding amendments. The right to know what charges are brought upon our nations corrections officer for violation of federal rights involves a question of exceptional importance. Consideration by this court is necessary to secure and maintain uniformity with this courts precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SEBASTIAN RUCCI
40 The Ledges, Unit 3C
Poland, OH 44514
Tel: (330) 707-1182
Fax: (330) 707-1882
Email: SebRucci@Gmail.com

Counsel for Petitioner